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83-37

IN THE

Supreme Court of the United States

July Term, 1982

SAM DAMICO, a/k/a SALVATORE DAMICO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT E.J. CURRAN
CURRAN, WINNING & FIORAVANTI
606 East Baltimore Pike
P.O. Box 30
Media, PA 19063
(215)565-4322
Counsel for Petitioner

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 238-2000

QUESTIONS PRESENTED

I. Whether it is error to refuse to instruct the jury, as requested by Petitioner, that willfulness, in a prosecution for violation of Title 26, United States Code, Section 7206(1), must be proved by independent evidence, and cannot be inferred from understatement of taxable income?

II. Whether the district court's refusal to instruct the jury upon the independent evidence rule denied petitioner due process of law in violation of the Fifth Amendment of the United States Constitution?

PARTIES TO THE PROCEEDING

Petitioner was the lone defendant in a prosecution initiated by the United States in the Eastern District of Pennsylvania at Criminal Number 82-78. Following conviction and sentence, Petitioner appealed to the United States Court of Appeals for the Third Circuit at Appeal Number 82-1472. The judgment of sentence was affirmed on May 17, 1983, by judgment order. No petition for rehearing en banc was filed. The mandate of the United States Court of Appeals for the Third Circuit issued on June 8, 1983.

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OPINIONS BELOW

Petitioner hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

The judgment order of the court of appeals (App. A, *infra*, A1-A2) is not yet reported. The memorandum and order of the district court (App. B, A3-A9), are also not reported.

STATEMENT OF GROUNDS FOR REVIEW

The judgment of the court of appeals was entered May 17, 1982 (App. A, *infra*, A1-A2). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 26, United States Code, Section 7206(1) provides: Any person who-

> (1) Declaration under penalties of perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;
>
> * * * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Title 26, United States Code, Section 7201 provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

The Constitution of the United States of America, Amendment V, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner was convicted on seven (7) counts of filing false personal and corporate returns involving four consecutive years.[1] The evidence, viewed in a light most favorable to the prosecution, established that Petitioner Damico was self-employed as a proprietor of business opportunity shows, leasing booths to exhibitors, selling franchises and admitting members of the public. According to the evidence, Damico omitted gate receipts from his personal and corporate tax returns.

The evidence of gate receipts was admitted from two sources: former employees and franchise exhibitors. The testimony included: estimates of the numbers of people admitted to business opportunity shows and consequent estimates of gate receipts; delivery of cash from gate receipts to Damico; and the failure to retain records of gate admissions and receipts. There was a sizable difference between reported gate receipts per Damico's corporate and personal returns, on the one hand, and the estimates of gate receipts by former employees and exhibitors on the other. There was no direct evidence of actual gate receipts. Further, there was no direct evidence of willfulness, only the possible inference of specific intent from apparent underreporting.

As determined by the district court in its memorandum and order:

> "From Damico's underreporting over a period of years, the large difference between income reported and gate attendance or receipts [at Damico's trade shows] estimated by witnesses, his failure to keep precise accounting of cash receipts . . ., and his destruction of gate receipt totals provided to him by his associates, it might reasonably be inferred that defendant willfully [falsified his returns].
>
> * * * *

1. The jury returned its verdict on June 24, 1982. On July 22, 1982, Damico was sentenced to imprisonment of one year and one day, fined $10,000, and ordered to serve a consecutive term of probation conditioned upon payment of the disputed tax.

> The testimony of Damico's trade show exhibitors regarding their estimates of trade show attendance was successfully impeached on cross-examination. However, the testimony of Damico's former employees and associates as to trade show attendance in combination with the records which they kept constituted credible evidence of Damico's willful underreporting of income." (App. B, A4-A5)

At the conclusion of the evidence, petitioner submitted written requested instructions. The district court was asked to instruct the jury that the requisite proof of intent could not be inferred from "mere understatement of income," be required independent evidence of willfulness.

The district court refused the requested instructions, and, instead defined willfulness as follows:

> "The term 'willful', as used in this statute, means a voluntary, deliberate and intentional violation of a known legal duty as distinguished from a careless, inadvertent or neglent act. That is to say, it can't be a good faith misunderstanding of what the law requires. You must find beyond a reasonable doubt that the defendant knew and specifically intended the return to be false when he made and subscribed it. In this case in particular you must find that the defendant knew he had received income which was not reported on the return in question, and that it should have been reported, under the law.'
>
> Negligence or carelessness alone will not suffice. That is, the test is whether or not the defendant knew, not whether he should have known. To convict, you must find that knowing his duty he intentionally chose not to do what the law required.
>
> By way of illustration only, willfulness may be inferred from the taxpayer's business experience, a consistent pattern of understatement of income, destruction or falsification of books and records, handling of financial affairs to avoid making the usual records, the concealment of sources of income, or any other conduct which would be likely to

mislead or conceal, but the fact that a taxpayer amends his tax return to include income previously omitted is not evidence of any willful misconduct in the filing of the original return." (App. C, A14).

ARGUMENT

I. The district court erred in refusing petitioner's requested jury instructions on "willfulness," since as this Court has held, willfulness must be proved by independent evidence, and may not be inferred from underreporting of income.

Petitioner's Point for Charge No. 6 read as follows:

> "It is axiomatic that the mere understatement of income of one's tax liability on his return cannot and does not constitute proof of the mental state required for this offense."

Petitioner's Point for Charge No. 9 read as follows:

> "I have said that willfulness must be proved by independent evidence. It cannot be inferred from the mere understatement of income. This is true as to each year in question. This means that willfulness as to the conduct of the defendant in the filing, for example, of his 1975 return during 1976 can, of course, not be found or inferred from anything that he did a year later in 1977 regarding his 1976 return and particularly you cannot infer willful misconduct in 1976 from the mere understatement in 1977 for the year 1976."

Petitioner's Point for Charge No. 13 read as follows:

> "The act here involved is the filing of an inaccurate return. In the complexity of successive tax laws, many thousands of taxpayers do that innocently. Such filing is unlawful, however, only if made willfully with knowledge of its falseness. There is no presumption that may be drawn from the act itself — both knowledge and willfulness must be established by independent proof, direct or circumstantial. *Lurding vs. United States*, 179 F.2d 419, 422 (6th Cir. 1950); [United States v.] Pechenik, [236 F.2d 844 (3rd Cir. 1957)]."

Petitioner's Point for Charge No. 20 read as follows:

> "In that all the evidence shows is a mistake on the 1975 return, that doesn't prove that the omission of similar income

> in 1976 wasn't also a similar mistake. In order for misconduct in one year to be evidence of misconduct in another year, you must first find convincing evidence that there really was misconduct in the first year and that means that the defendant actually knew he was obligated to report additional income in that year and deliberately failed to do so and filed the return knowing it was false. *U.S. vs. Long*, [257 F.2d 340 (3rd Cir. 1957)]."

The district court refused all of these requested points, and made no reference in its charge to the jury of either the "mere understatement" rule or the "independent evidence" rule. Instead, the jury was instructed that "willfulness may be inferred" from a consistent pattern of understatement of income and any other conduct of Petitioner which was likely to conceal the falsity of his tax returns.

The "independent evidence" rule originated in *Holland v. United States*, 348 U.S. 121 (1954), where this Court held that proof of willfulness in a tax evasion case, under Title 26, United States Code, Section 7201, involves proof of a specific intent which must be proved by independent evidence and which cannot be inferred from the mere understatement of income. *Accord, United States v. Sawyer*, 607 F.2d 1190 (7th Cir. 1979), *cert. denied*, ____ U.S. ____ (1980); *United States v. House*, 524 F.2d 1035 (3rd Cir. 1975); *United States v. Shavin*, 320 F.2d 308 (7th Cir.), *cert. denied*, 375 U.S. 944 (1963); *United States v. Alker*, 260 F.2d 135 (3rd Cir. 1958); *United States v. Pechenik*, 236 F.2d 844 (3rd Cir. 1957); *United States v. Lindstrom*, 222 F.2d 761 (3rd Cir.), *cert. denied*, 350 U.S. 841 (1955).

The district court, in ruling on post-trial motions, relied upon *United States v. Vacca*, 431 F.Supp 807, 810 (E.D. Pa. 1977), *aff'd mem.*, 571 F.2d 573 (3rd Cir. 1978), in holding that the "so-called independent evidence rule [is] inapplicable in a tax perjury case[,]" and is limited in its application to tax evasion cases (App. B, A6). The United States Court of Appeals for the Third Circuit affirmed Petitioner's judgment of sentence without opinion.

This Court has never directly confronted the question of whether the *Holland* independent evidence rule is inapplicable to tax perjury cases brought under Title 26, United States Code, Section 7206(1). Without directly addressing the question presented here, this Court has consistently held that the willfulness element appearing in both tax felonies and misdemeanors should be uniformly applied as requiring proof of an evil motive. *United States v. Pomponio*, 412 U.S. 10 (1976); *United States v. Bishop*, 429 U.S. 346 (1973). This Court, in dicta, has commented that "semantic confusion" arises by expressing the "attempt to evade" requirement of §7201 as implicit in the willfulness element of tax evasion, *id.* at 360-61 n.8, but has never held that the independent evidence requirement is inapplicable to tax felonies that do not include the attempt to evade element.

The language of Sections 7201 and 7206(1), enacted simultaneously, Aug. 16, 1954, ch. 736, 68 A. Stat. 851, 852, give no evidence of a legislative intent to distinguish the necessary proof of the respective elements of intent. Both are expressed as "willfulness." The legislative history is silent in terms of expressing a distinction. While the prosecutor's burden is lightened in 7206(1) cases, as compared to those brought under 7201, by the elimination of the necessity to prove a tax due and owing under 7206(1), he should still be required to establish that the falsity of the return was engendered by a tax evasion motive. *Barnett, Trial of Criminal Tax Cases, Univ. of Illinois Law Forum*, Vol. 4 (1968).

Unless this Court's independent evidence holding in *Holland* no longer has vitality, or is inapplicable to all but tax evasion cases brought under Section 7201, the district court's ruling on the requested jury instructions was error. It is submitted that the Court should grant certiorari to clarify the uncertainty of whether willfulness under the tax perjury statute, §7206(1), must be proved by independent evidence.

II. Under the facts of this case, the District Court's refusal to instruct upon the "Independent Evidence" rule denied petitioner due process of law in violation of the Fifth Amendment of the United States Constitution.

The district court found that Damico's willfulness could reasonably be inferred from: (1) the underreporting of income; (2) the difference between reported income and estimated gate receipts; (3) the failure to keep precise accounting records of cash receipts and (4) the failure to retain gate receipt totals provided to petitioner by his employees. (App B., A4). Stated differently, the evidence permitted the inference that Petitioner underreported income and did not keep accurate records.

In the face of this paucity of intent evidence, the district court instructed the jury:

> "[W]illfulness may be inferred from the taxpayer's business experience, a consistent pattern of understatement of income, destruction or falsification of books and records, handling of financial affairs to avoid making the usual records, the concealment of sources of income, or any other conduct which would be likely to mislead or conceal, . . ."

In effect, the district court invited the jury to infer willfulness form the defendant's acts of underreporting and failing to keep records.

Due process requires that each element of a criminal offense be proved by independent evidence beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). In particular, a jury instruction to the effect that Petitioner may be presumed to have specifically intended the consequences of his acts, may be interpreted as impermissibly creating a conclusive presumption or a rebuttable presumption shifting the burden of persuasion to defendant. *Cf. Sandstrom v. Montana*, 442 U.S. 510 (1979); *see also, Mullaney v. Wilbur*, 421 U.S. 684 (1975).

It is submitted that the district court's jury instructions permitted the finders of fact to infer *mens rea* in violation of the prosecution's due process obligation to prove Petitioner's intent beyond a reasonable doubt.[2]

2. The defect is particularly prejudicial in circumstances where the underreporting was established exclusively by "estimates" of gate receipts, which estimates were "successfully impeached." (App. B, A5).

CONCLUSION

Petitioner requests that certiorari be granted in that the district court's refusal of the "independent evidence" instruction, under the facts of this case, violated Petitioner's due process right to be convicted only upon evidence, beyond a reasonable doubt, of each element of the offense charged.

Respectfully submitted,

Robert E. J. Curran

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1472

UNITED STATES OF AMERICA

v.

SAM DAMICO, a/k/a SALVATORE DAMICO
Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(Crim. No. 82-00078-01)

Submitted Under Third Circuit Rule 12(6)
May 10, 1983
Before: ADAMS and WEIS, *Circuit Judges*, and DEBEVOISE, *District Judge**

JUDGMENT ORDER

After considering the contentions raised by appellant, namely, that (1) the district court erred in refusing to instruct the jury in accordance with written requests that willfulness in a prosecution for violation of 26 U.S.C. § 7206(1) cannot be proven by "mere understatement" of taxable income and must be proven by "independent evidence; and (2) that such error was prejudicial to his case, it is

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* Honorable Dickinson R. Debevoise, United States District Court for the District of New Jersey, sitting by designation.

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

_____

Circuit Judge

Attest:

_____

Sally Mrvos, Clerk

Dated: May 17, 1983

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal
	:	No. 82-00078
SAM DAMICO a/k/a SALVATORE DAMICO	:	

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, J. July 22, 1982

Sam Damico a/k/a Salvatore Damico ("Damico") was convicted by a jury on three counts of filing false individual income tax returns and four counts of filing false corporate income tax returns in violation of 26 U.S.C. §7206(1). Section 7206 provides in pertinent part:

> Fraud and false statements.
> Any person who —
> (1) *Declaration under penalties of perjury*. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Damico has moved for a judgment of acquittal and new trial. For the reasons discussed below, these motions will be denied.

I. ACQUITTAL

A motion for judgment of acquittal made after the jury has returned a verdict of guilty will not be granted if a reasonable mind might fairly conclude guilt beyond a reasonable doubt. *United States v. Phifer*, 400 F. Supp. 719, 724 (E.D. Pa. 1975), *aff'd. mem.*, 532 F.2d 748 (3d Cir. 1976). The evidence must be

viewed in a light most favorable to the government and the court may not intrude upon the jury's right to determine credibility, weigh the evidence and draw justifiable inferences of fact. *United States v. Reicherter*, 647 F.2d 397, 401 (3d Cir. 1981); *United States v. Pratt*, 429 F.2d 690, 691 (3d. Cir. 1970). We conclude that there was sufficient evidence for the jury to find Damico guilty beyond a reasonable doubt.

A conviction under §7206(1) requires proof that the defendant: (1) willfully subscribed to a return; (2) declared in writing that it was made under the penalties of perjury; and (3) did not believe it to be true as to every material matter. There was ample evidence in Damico's tax returns, the testimony of Damico's former associates and customers, and records which they kept as analyzed by a special agent of the Internal Revenue Service from which a jury might fairly find beyond a reasonable doubt that Damico intentionally and willfully underreported cash he received as entrance fees at weekend trade shows he organized. From Damico's underreporting over a period of four years, the large difference betwen income reported and gate attendance or receipts estimated by witnesses, his failure to keep precise accounting of cash receipts by ticket counts at the gate or otherwise, and his destruction of gate receipt totals provided to him by his associates, it might reasonably be inferred that defendant willfully subscribed to personal and corporate tax returns which he knew to be false. The motion for judgment for acquittal must be denied.

II. NEW TRIAL

Damico asserts four grounds in support of his motion: (1) the verdict was contrary to the evidence; (2) the verdict was contrary to the weight of the evidence; (3) the court "erred in failing to instruct the jury that evidence independent of understatement of income was needed for proof of willfullness;" and (4) the court erred in refusing to require the government to provide the defendant with the entire Special Agent's Report pursuant to the Jencks Act.

The verdict is not contrary to the evidence for the reasons cited above, nor was the verdict contrary to the weight of the

evidence. The testimony of Damico's trade show exhibitors regarding their estimates of trade show attendance was successfully impeached on cross-examination. However, the testimony of Damico's former employees and associates as to trade show attendance in combination with the records which they kept constituted credible evidence of Damico's willful underreporting of income. The court is aware that each of these witnesses had some demonstrated reason for hostility towards the defendant; there was also a reasonable inference that one or more of these witnesses may have been involved with Damico in underreporting income from these shows. However, this did not necessarily deprive the testimony of weight. Credibility issues were properly for the jury.

Damico cites *Holland v. United States*, 348 U.S. 121 (1954), for the proposition that the court should have instructed the jury that evidence independent of understatement of income was needed for proof of willfulness. The *Holland* court expressed concern with the use of circumstantial evidence in a "net worth theory" tax evasion case, a method which itself is only an approximation. *Id.* at 124, 129. However, Damico was tried on a charge of tax return perjury. *See*, 26 U.S.C. §7206(1). *Holland* requires willfulness to be proved by independent evidence and not by inference from the mere understatment of income in a tax evasion case. *See*, 26 U.S.C. §7201. Section 7201 requires proof of a willful affirmative act of evasion or attempted evasion of tax. *Sansone v. United Studies*, 380 U.S. 343, 351 (1965). In a perjury case, the government need not prove either intent to evade payment of taxes, *United States v. Taylor*, 574 F.2d 232, 234 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978), or the exact amount of unreported income. *United States v. Wilson*, 601 F.2d 95, 99 (3d Cir. 1979). The government need only prove that a material item on the return was false and that the defendant knew and intended it to be false. *Taylor, supra* at 234-35.

Although the Supreme Court has characterized the *definition* of willfulness in the tax evasion-tax fraud statutes as "uniform," *United States v. Bishop*, 412 U.S. 346, 360 n.8 (1973), and " 'a constant rather than a variable in the tax penalty formula,' " *United States v. Pomponio*, 429 U.S. 10, 12 n.3 (1976)

(quoting *Bishop, supra* at 359-60), the nature of the allowable *proof* of willfulness may differ in a perjury case from that in a tax evasion case. The so-called independent evidence rule has been held inappplicable in a tax perjury case. *United States v. Vacca*, 431 F. Supp. 807, 810 (E.D. Pa. 1977), *aff'd mem.*, 571 F.2d 573 (3d Cir. 1978).

The court instructed the jury that an essential element of the crimes here charged was that the false statements of material facts be willful, that is, that the defendant knew they were false and specifically intended them to be false. Willfullnes was defined as follows:

> The term "willful," as used in this statute, means a voluntary, deliberate and intentional violation of a known legal duty as distinguished from a careless, inadvertent or negligent act. That is to say, it can't be a good-faith misunderstanding of what the law requires. You must find beyond a reasonable doubt that the defendant knew and specifically intended the return to be false when he made and subscribed it. In this case in particular you must find that the defendant knew he had received income which was not reported on the return in question, and that it should have been reported, under the law.
>
> Negligence or carelessness alone will not suffice. That is, the test is whether or not the defendant knew, not whether he should have known. To convict, you must find that knowing his duty he intentionally chose not to do what the law required. (Charge Tr. at 9).

See, United States v. Pomponio, 429 U.S. 10, 12 (1976); *United States v. Edelson*, 604 F.2d 232, 235-36 (3d Cir. 1979).

The Court further charged, "[B]y way of illustration only, willfulness may be inferred from the taxpayer's business experience, a consistent pattern of understatement of income, destruction or falsification of books and records, handling of financial affairs to avoid making the usual records, the concealment of sources of income, or any other conduct which would be likely to mislead or to conceal . . . ." (Charge Tr. at 9-10). *See, Spies v. United States*, 317 U.S. 492, 499 (1943).

Defendant's requested instruction that mere understatement of income was insufficient to convict was not given in the exact wording requested. But in accordance with the discussion at the charging conference, the court did instruct the jury that the crimes charged could be proved only by defendant's intentional and willful false statements. It was made clear that in order to find the defendant guilty, the jury must find beyond a reasonable doubt not only that the defendant did the acts charged but that the acts were done willfully by him. The instructions made clear to the jury that mere understatement of income alone was not the equivalent of a voluntary, deliberate and intentional violation of a known legal duty.

Moreover, as to each count of the indictment, much more than mere understatement of income was proved. A consistent pattern of understatement over four years, the nature of the understatements, and the method of collecting receipts on a cash basis without verifiable tallying or accounting methods allowed a reasonable inference of willfulness. The question of willfulness was for the trier of fact. *United States v. House*, 524 F.2d 1035, 1045 (3d 1975). If there was error in refusing the charge requested, it was harmless.

No violation of the Jencks Act requires a new trial. "The Jencks Act, 18 U.S.C. §3500, requires the government to produce, on motion of defendant, any statement of a government witness *which relates to the subject matter of that witness' testimony*." *United States v. Butts*, 535 F. Supp. 608, 612 (E.D.Pa. 1982) (emphasis added). The signed report of a special agent of the Internal Revenue Service who testifies at trial may contain Jencks Act material and, therefore, it is obligatory for the government to at least produce it to the court for *in camera* consideration. *See, United States v. Walden*, 578 F.2d 966, 970 (3d Cir. 1978).

The court examined the agent's report *in camera* and ordered disclosure to Damico of the portions which related to the agent's testimony. The Special Agent's testimony was limited to: (1) summary testimony based on an analysis of Damico's tax returns and other documentary records; (2) interviews with Damico; and (3) service of summons on Damico's corporation

and subsequent receipt or non-receipt of particular documents and records. Of a fifty page report, twenty-three pages were ordered disclosed in whole or in part. The government voluntarily disclosed four additional pages.[1] Damico was not prejudiced by the non-disclosure of portions of the Special Agent's report outside the scope of his testimony.[2] The requirements of the Jencks Act were met.

Defendant claims that he was entitled to the inspection of the entire report under "the rule" of *United States v. Cleveland*, 507 F.2d 731 (7th Cir. 1974). But the procedure followed in *Cleveland* was identical to that in this case: the trial court conducted an *in camera* inspection of the special agent's report to determine if any *part* of the report need be produced. *Id.* at 732. The Court of Appeals for the Seventh Circuit held the trial court erred in assessing the portions of the report which related to the agent's testimony. Its prospective ruling that the government should tender the entire special agent report to the defendant was limited to tax evasion cases based on the net worth method of proof because of "the interrelationship of several factors unique" to such prosecutions. *Id.* at 737. These factors included the circumstantial nature of evidence in net worth cases, the extended length of the reports, and the scope of the agent's testimony. *Id.* at 736-37. None of these factors was present here. For these reasons, a new trial is not "required in the interest of justice." Fed.R.Crim.P. 33.

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1. The full report was docketed and filed under seal to preserve the record. The redacted version of that report, disclosed to Damico, was docketed and filed.

2. Several small sections of the report were also disclosed to defendant under the rule of Brady v. Maryland, 383 U.S. 83 (1963). Damico does not contest the extent of these disclosures.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal
	:	No. 82-00078
SAM DAMICO a/k/a SALVATORE DAMICO	:	

ORDER

AND NOW, this 22d day of July, 1982, upon consideration of defendant's post-trial motions, the government's responses thereto and for the reasons stated in the foregoing Memorandum, it is ORDERED that:

1. Defendant's Motion for Judgment of Acquittal is DENIED.

2. Defendant's Motion for New Trial is DENIED.

_____

J.

APPENDIX C

CHARGE OF THE COURT

SHAPIRO, J.:

Members of the jury, the evidence and arguments in the case are now completed and now it is my duty to instruct you on the law applicable to the case. Of course, it is your duty to follow my instructions on the law. You mustn't question any rule of law as I state it in these instructions because, regardless of any personal opinion you might have about what the law is or what it ought to be, you have to base your verdict on the law as I state it.

It is your duty to determine the facts from the evidence in this case. You are to apply the law given you in these instructions to the facts, and that is the way that you will reach your verdict.

Statements and arguments of counsel are not evidence in the case unless it was reported as a stipulation of fact, and as I told you at the beginning, when the attorneys stipulate to a fact, then you accept that as evidence.

The evidence consists of the sworn testimony of the witnesses, all exhibits received in evidence, and the facts which were stiputlated.

Any evidence to which an objection was sustained and any evidence that I ordered stricken must, as I told you before, be entirely disregarded.

Anything that you heard outside the courtroom, of course, is not evidence and must be disregarded. But you are not limited just to what you saw and heard in the courtroom. There are inferences that you can draw from the evidence.

There are also two types of evidence, direct and circumstantial. The direct evidence was the testimony of the person who claims to have personal knowledge of the commission of the crime charged. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether a defendant is guilty or not guilty, and the law makes no distinction between the weight to be given direct or circumstantial evidence. You may consider all the evidence in the case, including circumstan-

tial evidence, in arriving at your verdict. You should consider, for example, in talking about the kind of conclusions you can draw from evidence, I sometimes tell a jury if you are here all day and you go outside and you see the sidewalks wet and you see raindrops on the cars, it is permissible to conclude that in your absence it was raining.

So, you must consider only the evidence in this case, but you are not limited to the bald statements of the witnesses. You are permitted to draw from the facts which have been proved in your opinion reasonable inferences justified in the light of your experience, inferences or deductions or conclusions which reason and common sense permit the jury to draw from the facts established by the evidence in the case.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight that their testimony deserves.

Anything that I asked or said during the course of the trial should not suggest to you that I have any opinion on credibility of any of the witnesses or any opinion as to what your verdict should be.

You must carefully scrutinize all the testimony that was given, the circumstances under which each witness testified, and every matter in evidence which tends to show whether or not a witness is worthy of belief. You may consider each witness's intelligence, motive, state of mind, demeanor and manner while on the stand, and the fashion in which he or she answered the questions.

Consider also any relation that the witness has to the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, the evidence is supported or contradicted by other evidence in the case.

You may, of course, consider any demonstrated bias, prejudice, or hostility of a witness in determining the weight to be accorded to the testimony.

So, in judging the credibility of the witnesses, you must use your own common sense and apply your usual tests for determining whether or not people are telling the truth. In your everyday affairs you always have to determine whether or not to believe people with whom you deal, and those are the tests that

you will apply in making your determination today. You will observe their demeanor on the stand, their forthrightness and responsiveness to questions from both the Government and from defense counsel, and you may, if you observed it, take into account reluctance to answer from one side or the other.

Inconsistent statements or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you, as jurors, to discredit the testimony. Two persons witnessing an incident or a transaction may see or here it differently. Innocent misrecollection, like failure of recollection, is not an uncommon experience, but in weighing the effect of discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood, in your opinion. After making this judgment, you will give testimony of each witness the credibility, if any, you think it deserves.

The testimony of a witness may be discredited or impeached by showing he or she previously made statements inconsistent with his or her present testimony. The earlier contradictory statements are admissible only to impeach credibility of the witnesses, not to establish the truth of the statement.

It is your province to determine the credibility, if any, to be given the testimony of a witness who has been impeached. If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust that witness's testimony in other particulars. You may reject all the testimony of that witness or give it such credibility as you think it deserves.

As I told you when we began this case, the indictment is not evidence. The mere fact that a grand jury has returned a bill of indictment against a defendant has no tendency to prove that he is guilty of the offense charged. It merely is sufficient to bring the case to trial. It is a formal method of making a charge, and you must not infer from the fact the defendant was indicted that he is in any way guilty of the crimes charged.

You will note that the indictment charges that the offenses were committed on or about a certain date. The proof need not establish with certainty the exact date of the alleged offenses. It

is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offenses were committed on a date reasonably near the date alleged.

The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty on each of the charges presented to you as to each charge, of course.

The Government has the burden of proving guilt of the defendant beyond a reasonable doubt, and this burden exists throughout the case, as I stated. Reasonable doubt can exist from the evidence produced or by the lack of evidence produced by the Government.

The defendant is not required to prove his innocence or to produce any evidence.

Now, on the meaning of reasonable doubt, the proper definition is a doubt arising from the evidence or lack of evidence which would cause you, as a reasonable person, to hesitate to act in a matter of importance in your own life.

Now I want to discuss with you these particular charges which, as I told you in the beginning, arise under a provision of the United States laws, Title 26 of the United States Code, Section 72061. To obtain a conviction under that section of our laws, the Government must establish the following essential elements:

> The making and subscribing of a return which is false as to a material matter;
>
> The return must contain a written declaration that it is made under the penalties of perjury.

The parties have stipulated that each of the returns in question was signed. If you find that substantial income has been omitted from any return, such omission is material under the law.

Now, in addition to finding the making and subscribing of a return false as to a material matter and the return having been

made under the penalties of perjury, you have to find that the Government has proved beyond a reasonable doubt that the maker, the person who subscribed to the return, in this case the defendant, does not believe the return to be true and correct as to the material, a material matter.

The false statement of a material fact must be willful, that is, the Government must establish that the defendant knew that it was false and specifically intended it to be false.

In order to find a defendant guilty of any or all of the charges contained in the indictment, you must find not only that the defendant did the act complained of and of which he stands charged, that is, this false subscribing to the return, but you must find beyond a reasonable doubt that the acts were done willfully by him.

The term "willful," as used in this statute, means a voluntary, deliberate and intentional violation of a known legal duty as distinguished from a careless, inadvertant or negligent act. That is to say, it can't be a good-faith misunderstanding of what the law requires. You must find beyond a reasonable doubt that the defendant knew and specifically intended the return to be a false when he made and subscribed it. In this case in particular you must find that the defendant knew he had received income which was not reported on the return in question, and that it should have been reported, under the law.

Negligence or carelessness alone will not suffice. That is, the test is whether or not the defendant knew, not whether he should have known. To convict, you must find that knowing his duty he intentionally chose not to do what the law required.

By way of illustration only, willfulness may be inferred from the taxpayer's business experience, a consistent pattern of understatement of income, destruction or falsification of books and records, handling of financial affairs to avoid making the usual records, the concealment of sources of income, or any other conduct which would be likely to mislead or conceal, but the fact that a taxpayer amends his tax return to include income previously omitted is not evidence of any willful misconduct in the filing of the original return.

There is a distinction between civil liability for the payment of taxes and criminal liability. This is a criminal case. Under our tax laws, you are not to concern yourselves with any effect this case might have on the civil action for collections of taxes, which is a separate matter not before you.

We are concerned in this case with two different tax-reporting entities, and two different types of tax returns. The indictment charges the defendant's personal returns, that is, Forms 1040, for himself and his wife for the calendar years 1975, 1976, and himself for 1977 were false, and that the returns of Main Line Marketing, Inc., a corporation, their Forms 1120 for the fiscal years 1975 through November, 1978, were also false.

It is important to keep these two separate types of returns and separate tax-reporting entities separate in your mind. Each of these entities had an obligation, under the law, to file tax returns and report income. For that reason you must decide as to each return and for each taxable year whether the Government has proved beyond a reasonable doubt that there was unreported income, that is, omission to report substantial cash receipts from these business-opportunity shows, and also that it was willful, that is, deliberately and intentionally unreported by the defendant, knowing he was obligated to report those cash receipts.

If Main Line Marketing organized and operated these shows and cash was received for admission fees, these receipts should have been reported on the tax returns filed on its behalf, signed, that is, subscribed to, by the defendant.

If a particular item of income is actual income to a corporation at a particular time, it is not income to one of the corporation shareholders for that period until it passes through the corporation and goes to the shareholder as salary or distribution of the corporation's income as a dividend, for example, but income actually received by a taxpayer from whatever source is reportable by that taxpayer.

In summary, each count of the indictment charges the defendant with having committed a separate offense, that is, each tax year and each return is charged as a separate offense, and the evidence relating to it should be considered separately, and a

separate, unanimous verdict should be returned as to each count.

Your verdict of guilty or not guilty of an offense charged in one count does not control your decision as to any other count.

Under your oath as jurors, you are not to be swayed by sympathy or bias. You are to be guided solely by the evidence in the case, and the crucial question you must ask yourself as you sift through this evidence is where do you find the truth. A trial is a quest for truth, not a battle of wits or a contest of salesmanship or a contest of personalities. The only triumph in any case is whether truth has triumphed. If so, justice has been done; and if not, justice will not have been done.

The conduct charged is illegal under federal law. The issue for you to decide is whether or not the defendant has violated that law. You are to determine the guilt or innocence of the defendant on the basis of the evidence and subject to the law, as I have charged. If you find the law has not been violated, you should not hesitate for any reason to return a verdict of not guilty. On the other hand, if you find beyond a reasonable doubt that the law has been violated as charged, you should not hesitate to render a verdict of guilty because of sympathy or bias, prejudice, public opinion or your own views as to the propriety or desirability of the conduct, that is, you must not decide this matter on anything other than the evidence and the law as I have instructed you and as you agreed when you took your oath as jurors in this case.

Your verdict must be unanimous, and it must be unanimous as to each count considered separately, but it should represent the conscientious determination of each and every one of you. You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, present your own views, listen to the opinion of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong, but don't surrender your honest beliefs about the weight or effect of the evidence solely because of the opinion of your fellow jurors or just in order to return a unanimous verdict.

You should give fair and equal consideration to all the evidence, and deliberate with the goal to reaching an agreement consistent with the individual judgment of each of you as jurors.

You are impartial judges of the facts. Your sole interest will be to determine whether the Government has proved its case beyond a reasonable doubt.

You must bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. The defendant has an absolute right not to testify. The fact that the defendant did not testify should not be considered by you in any way by you in arriving at your verdict.

I do not anticipate that you will need to communicate with me. If you do, however, the only proper way is in writing, signed by the foreperson, or if he or she is unwilling to do so, by some other juror and given to the marshal. However, do not advise the marshal, the Court, or, of course, anyone else of any tentative vote, that is, how you may be divided in the course of reaching a unanimous verdict.

Upon retiring to the jury room, you will select one of your number as the foreperson, who will preside over your deliberations and be your representative here in court.

I have prepared a form of verdict which will go to the jury room with you, and when you receive it, you will observe that each charge of the indictment is stated in full, and as to each you will be asked to state a unanimous verdict of the jury whether it is guilty or not guilty.

When you have concluded your consideration of all seven counts, you will notify the marshal that you have reached a verdict.